# PB Securities Sdn Bhd v Justin Ong Kian Kuok

HIGH COURT (KUALA LUMPUR) — SUIT NO D3–22–705 OF 1998
ZULKEFLI J
8 SEPTEMBER 2006

*Contract — Shares, sale of — Contra losses — Validity of a trading account — Whether manipulated by the remisier — Whether done far in excess of the trading limit — Whether losses can be set-off from the remisier's deposit pursuant to the remisier's agreement — Whether the zero balance in the monthly account constitutes a discharge of the amount owing to the plaintiff — Whether plaintiff's claim founded on the doctrine of subrogation — Whether there was any fraud against the defendant*

The plaintiff's claim against the defendant is in respect of contra losses incurred in the defendant's share trading account arising from the purchase and sale of shares under the terms and condition of the Individual Application Form entered into between the plaintiff and defendant on 9 September 1993. The defendant made several allegations against the plaintiff, inter alia: (i) the validity of the Individual Application Form (exh P1); (ii) that his account was manipulated by the remisier; (iii) that numerous transactions were done far in excess of the trading limit; (iv) the issue of the losses being set-off from the remisier's deposit pursuant to the remisier's agreement and whether the zero balance in the monthly account constitute a discharge of the amount owing to the plaintiff; (v) issue of subrogation; and (vi) fraud against the defendant.

**Held**, allowing plaintiff's claim with costs:

(1) On the validity of exh P1 signed by the defendant and the defendant's obligation therein, the defendant is bound by those terms in the document (see the case of *Sarawak Securities Sdn Bhd v Andy Chan Chiaw Guan* [2000] MLJU 406) (see para 5).

(2) The defendant had admitted receiving several of the contract notes, contra statements and monthly statements from the plaintiff. It is noted that the defendant did not challenge them nor lodge a complaint to the plaintiff regarding his account. The plaintiff has further furnished the certificate under Section 90A Evidence Act 1950 wherein all the contract notes, contra statements and monthly statements were produced as evidence during the course of the trial. These computer generated documents was admissible as evidence of any fact stated therein without having to call the maker of such document (see *Dhanarai a/l Jayaram v M & A Securities Sdn Bhd* [1998] MLJU 526) (see paras 6–7).

(3) With regard to the trading limit, it is noted there was no evidence adduced by the defence to prove that the defendant had objected to the increased trading limit. For the plaintiff there is evidence of PW1 who testified that the trading limit is a guide for a remisier to determine the amount of transactions that the remisier would allow the client to trade (see para 12).

(4) The trading limit can be breached and it depends on the remisier's assessment of the credit worthiness of the clients, the collateral and the remisier's deposit. This part of the evidence was not challenged by learned counsel for the defendant. There is also the evidence of PW3 (remisier) who testified that at the material time his security deposit was RM746,970.43 and that the plaintiff's company had given him 10 times that of his security deposit as a trading limit which means roughly about RM7.4 million. Even if the transaction exceeded the trading limit this alone does not invalidate the transaction. The breach of the trading limit is only for internal use and it is up to the plaintiff in its discretion to permit such trading (see para 13).

(5) On the issue of the losses being set-off from the remisier's deposit pursuant to the remisier's agreement and whether the zero balance in the monthly account constitute a discharge of the amount owing to the plaintiff, the plaintiff's witnesses PW1 and PW3 had testified that the zero balance arose as a result of the set-off from the remisier's deposit due to the defendant's failure in settling the debt after a certain period. This set-off according to PW1 and PW3 applied to all remisiers in the plaintiff's company in accordance with the Remisiers Agreement. PW1 further testified that if there was any payment received from the client after the set-off from the remisier's deposit, the said sum would be debited back to the remisier. The zero balance appearing in the defendant's monthly statements arose after the plaintiff deducted the defendant's remisier's deposit. The defendant's liability to pay the plaintiff arises out of the undertakings and indemnities given in his Account Application Form and the zero balance did not come about due to the defendant's settlement of the outstanding losses. The plaintiff's evidence was unchallenged and not disputed by the defendant (see paras 15–16).

(6) On the issue of subrogation the plaintiff contends that it has the right to pursue the claim against the defendant, notwithstanding that the debt was deducted from the remisier's deposit. The plaintiff's claim against defendant is founded on the doctrine of subrogation. There is merit in the plaintiff's contention. This is clearly borne out by the evidence of the remisier (PW3) where he confirmed that he instructed the plaintiff to commence this action against the defendant for the recovery of the sum due and owing as contained in the amended statement of claim. It is noted that PW1 for the plaintiff had testified that the outstanding losses from the defendant were set-off against the remisier's deposit. Hence the amount owing from the defendant would be credited back to the remisier's deposit upon settlement received from the defendant. In the circumstances, the correct party to commence this action is the plaintiff's company since the privity of contract only exists between the plaintiff and the defendant as the contracting parties for the said transactions (see paras 17–18).

(7) On whether the defendant's remisier had committed fraud against the defendant as contended by the defendant, there is no evidence led by the defendant to prove this. The only evidence raised by the defendant was his allegation about the use of third party accounts for the transaction. This aspect of the issue had been satisfactorily explained by PW3 and PW4. There is the further evidence of the defendant having settled some of these losses involving the third party accounts by the various receipts which were produced during the trial. In the light of the foregoing, the allegation remains unproven and ought to be viewed as an afterthought (see para 19).

**[Bahasa Malaysia summary**

Tuntutan plaintif terhadap defendan adalah berkenaan dengan kerugian contra dalam akaun pengurusniagaan saham yang diakibatkan daripada pembelian dan penjualan saham-saham di bawah terma-terma dan syarat Borang Permohonan Individu yang dimasuki di antara plaintif dan defendan pada 9 September 1993. Defendan membuat dakwaan terhadap plaintif, antara yang lainnya adalah: (i) kesahan Borang Permohonan Individu (eksh P1); (ii) bahawa akaunnya dimanipulasikan oleh remisier; (iii) bahawa beberapa transaksi dilakukan jauh melebihi had pengurusniagaan; (iv) isu kerugian ditolak daripada deposit remisier berikutan perjanjian remisier dan sama ada baki sifar di dalam akaun bulanan membentuk satu pelepasan amaun yang dihutang kepada plaintif; (v) isu subrogasi; dan (vi) fraud terhadap defendan.

**Diputuskan**, tuntutan plaintif dibenarkan dengan kos:

(1) Kesahihan eksh P1 yang ditandatangani oleh defendan dan obligasi defendan di dalamnya, defendan adalah terikat dengan terma-terma di dalam dokumen tersebut (lihat kes *Sarawak Securities Sdn Bhd v Andy Chan Chiaw Guan* [2000] MLJU 406) (lihat perenggan 5).

(2) Defendan telah mengakui menerima beberapa nota kontrak, penyata-penyata kontra dan penyata-penyata bulanan daripada plaintif. Adalah didapati bahawa defendan tidak mempertikaikan ataupun membuat aduan kepada plaintif berhubung dengan akaunnya. Plaintif selanjutnya telah membekalkan perakuan di bawah s 90A Akta Keterangan 1950 yang mana kesemua nota kontrak, penyata kontra dan penyata bulanan dikemukakan sebagai bukti ketika perbicaraan. Dokumen-dokumen yang dihasilkan oleh sebuah komputer boleh diterima sebagai keterangan atas fakta-fakta yang dinyatakan di dalamnya tanpa perlu memanggil pembuat dokumen tersebut (lihat *Dhanarai a/l Jayaram v M & A Securities Sdn Bhd* [1998] MLJU 526) (lihat perenggan 6–7).

(3) Berhubungan dengan had pengurusniagaan, adalah didapati bahawa tiada keterangan yang diberikan oleh pembelaan untuk membuktikan bahawa

defendan ada membuat bantahan terhadap kenaikkan had pengurusniagaan. Bagi pihak plaintif, terdapatnya bukti oleh PW1 yang memberi keterangan bahawa had pengurusniagaan adalah satu garis panduan bagi remisier untuk memastikan jumlah transaksi bagi remiser yang membenarkan kliennya untuk berurusniaga (lihat perenggan 12).

(4) Had pengurusniagaan boleh dilanggari dan ia bergantung kepada penilaian remisier terhadap kebolehpercayaan kliennya, kolateral dan deposit remisier. Bukti ini tidak dipertikaikan oleh peguamcara defendan yang bijaksana. Terdapat juga keterangan oleh PW3 (remisier) yang memberi keterangan bahawa pada masa material, deposit sekuritinya adalah RM746,970.43 dan syarikat plaintif telah memberikannya 10 kali ganda deposit sekuritinya sebagai had pengurusniagaan iaitu lebih kurang RM7.4j. Walaupun transaksi tersebut melepasi had pengurusniagaan, ini dengan sendirinya tidak menjadikan transaksi tersebut tidak sah. Perlanggaran had pengurusniagaan adalah hanya untuk kegunaan dalaman dan ia adalah pada budibicara plaintif untuk membenarkan pengurusniagaan sebegini (lihat perenggan 13).

(5) Berkenaan denganisu kerugian ditolak daripada deposit remisier berikutan Perjanjian Remisier dan samada baki sifar di dalam akaun bulanannya menjadikan satu perlepasan ke atas jumlah yang perlu dibayar kepada plaintif, saksi-saksi plaintif PW1 dan PW3 telah memberi keterangan bahawa baki sifar adalah hasil dari tolakan deposit remisier yang disebabkan kegagalan defendan menyelesaikan hutang selepas satu jangkamasa tertentu. Tolakan ini, menurut PW1 dan PW3 digunakan oleh kesemua remisier di syarikat plaintif seperti yang dinyatakan di perjanjian remisier. PW1 juga memberi keterangan bahawa sekiranya terdapat sebarang bayaran yang diterima daripada klien selepas tolakan daripada deposit remisier, jumlah tersebut akan didebitkan kepada remisier. Baki sifar yang kelihatan dalam penyata bulanan defendan adalah berbangkit selepas plaintif menolak deposit remisier defendan. Tanggungjawab defendan untuk membayar plaintif berbangkit atas akujanji dan indemniti di dalam Borang Permohonan Akaunnya dan baki sifar tidak bermakna defendan telah menyelesaikan kerugian yang belum dibayar. Keterangan plaintif tidak dicabar ataupun dipertikaikan oleh defendan (lihat perenggan 15–16).

(6) Atas isu subrogasi plaintif menyatakan ia mempunyai hak menuntut tuntutan tersebut terhadap defendan, walaupun hutang tersebut ditolak daripada deposit remisier. Tuntutan plaintif terhadap defendan berdasarkan doktrin subrogasi. Terdapat merit dalam penyataan plaintif. Ini adalah jelas daripada keterangan remisier (PW3) di mana dia mengesahkan bahawa dia telah memberi arahan kepada plaintif untuk memulakan tindakan ini terhadap defendan untuk mendapat kembali jumlah yang diperlu dibayar dan dihutang seperti yang terkandung di dalam penyataan tuntutan yang dipinda. Adalah didapati bahawa PW1 bagi pihak plaintif memberi keterangan bahawa kerugian yang perlu dibayar oleh defendan telah ditolak daripada deposit remisier. Dengan itu amaun yang dihutang oleh defendan akan dikreditkan semula ke deposit remisier setelah penyelesaian diterima daripada defendan.

Dalam keadaan ini, pihak yang betul untuk mengambil tindakan ini ialah syarikat plaintif oleh kerana priviti kontrak hanya di antara plaintif dan defendan sebagai pihak-pihak yang berkontrak untuk transaksi tersebut (lihat perenggan 17–18).

(7) Sama ada remisier defendan telah melakukan fraud terhadap defendan seperti yang dikatakan oleh defendan, tiada bukti yang diberikan oleh defendan untuk membuktikannya. Bukti yang hanya dapat yang dibangkitkan oleh defendan adalah pengataan pemakaian akaun pihak ketiga untuk transaksi tersebut. Isu ini telah dijelaskan dengan baiknya oleh PW3 dan PW4. Terdapat juga bukti lanjutan bahawa defendan telah menyelesaikan sebahagian daripada kerugian berhubungan dengan akaun pihak ketiga melalui beberap resit-resit yang dikemukakan ketika perbicaraan. Dalam keadaan ini, pengataan tidak dapat dibuktikan dan dengan itu harus dipandang sebagai difikirkan kemudian (lihat perenggan 19).]

**Notes**

For a case on contra losses, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) para 4457.

**Cases referred to**

*Arab-Malaysian Securities Sdn Bhd v Chan Mon Hoi @ Yeo Mon Hoi* [2000] MLJU 774 (refd)
*Dhanarai a/l Jayaram v M & A Securities Sdn Bhd* [1998] MLJU 526 (refd)
*One & Co Pte Ltd v Foo Sae Heng* [1990] 2 MLJ 85 (refd)
*Sarawak Securities Sdn Bhd v Andy Chan Chiaw Gua* [2000] MLJU 406 (folld)

**Legislation referred to**

Evidence Act 1950 s 90A

*Ravindra Kumar, Christopher Arun, Peter Douglas Ling, Mary Song, Benjamin Kong (Raja, Darryl & Loh) for the plaintiff.*
*Idris Mohd Isa, Zulhasmi Zakaria, Adi Haslan (Idris & Partners) for the defendant.*

**Zulkefli J:**

THE PLAINTIFF'S CLAIM

**[1]** The plaintiff's claim against the defendant is in respect of contra losses incurred in the defendant's share trading account arising from the purchase and sale of shares under the terms and condition of the Individual Application Form entered into between the plaintiff and defendant on 9 September 1993.

THE DEFENCE

**[2]** The defendant contended that he did not give instructions to the remisier of the plaintiff's company to conduct the shares trading for and on his behalf which resulted in losses in the defendant's account and that the shares trading were

manipulated by the said remisier. The defendant also alleged against the plaintiff that numerous transactions were done far in excess of the trading limit.

DECISION OF THE COURT

**[3]** It is my finding, there is no dispute that the defendant had signed the Individual Application Form for the shares trading transaction as shown in exh P1. The defendant therefore must be treated to have been bound by the terms and conditions stated therein and was aware of his responsibility to settle the losses in the said shares trading transaction.

**[4]** Based on the exh P1, it is my view that the defendant is bound by his undertaking to make immediate payments against delivery of stocks and/or shares purchased on his behalf. The defendant also undertakes to pay the amount of deposit required by him on purchasing contracts made on his behalf, the balance of which (if any) will be paid immediately on delivery of stocks and/or shares. I also find that by virtue of the said exh P1 the defendant has authorized the plaintiff to sell out or buy in such stocks and/or shares as may be required and the defendant undertakes to indemnify the plaintiff against all losses in such events should he fail to comply with the conditions stated therein (see exh P1 of ABD cl (d)1). Under exh P1, the defendant also authorizes the plaintiff to utilize monies due to the defendant to set-off his liabilities in the plaintiff's company and agrees to pay interest on the outstanding debit balance of his account should there be a delay in settlement (see cl (e) and (f) of exh P11.

**[5]** On the validity of exh P1 signed by the defendant and the defendant's obligation therein, I would like to refer to the case of *Sarawak Securities Sdn Bhd v Andy Chan Chiaw Guan* [2000] MLJU 406 wherein the court, inter alia, held as follows:

> The application to open a trading account was a valid and binding document whose terms and documents were binding on the defendant. Basically, parties are bound by the terms and conditions of the contract entered into under a trading account for the purchase and sale of shares. The relationship between the parties herein was purely contractual.

**[6]** It is my finding that the defendant had admitted receiving several of the contract notes, contra statements and monthly statements from the plaintiff. It is noted that the defendant did not challenge them nor lodge a complaint to the plaintiff regarding his account. During the examination-in-chief of PW1 and PW2, it was confirmed that the contract notes, contra statements and monthly statements were forwarded to the defendant by ordinary post to the address stated by the defendant in the application form. The defendant had further confirmed that the address stated was indeed his mailing address.

**[7]** In this case, the plaintiff has further furnished the certificate under s 90A of the Evidence Act 1950 wherein all the contract notes, contra statements and monthly

statements were produced as evidence during the course of the trial (see exh P8). On this point I would like to refer to the case of *Dhanarai a/l Javaram v M & A Securities Sdn Bhd* [1998] MLJU 526 wherein the court inter alia stated that the contra statements and contra notes were all computer generated documents and the effect of the certificate produced by the respondent in compliance with s 90A of the Evidence Act 1950 was that the computer generated documents was admissible as evidence of any fact stated therein without having to call the maker of such document. Therefore, in the present case by virtue of s 90A(1), the facts stated in the contra statements and contract notes, namely, what shares had been bought and sold by the order of the defendant had all become properly admitted in evidence.

**[8]** The evidence of PW2 showed that the contract notes, contra statements and monthly statements were posted to the defendant at his mailing address. The defendant had during cross-examination admitted receiving some of the contract notes and the monthly statements. A reference to exh P16 showed several letters of demand were sent to the defendant which were admittedly received by him. In the circumstances, the defendant had full knowledge of the status of his account at the material time.

**[9]** With regard to the defendant's allegation that his account was manipulated by the remisier, I find such an allegation is unfounded since the defendant had admitted during cross-examination that he had never complained of any irregularity in his trading account at the material time. This fact is more apparent since each of the contract notes provides the following statement: *All errors if any must be notified to us immediately* (see exh P9).

**[10]** It is noted that the transactions involving the subject matter of the plaintiffs claim were incurred between September 1994 to November 1994. The defendant had during cross-examination admitted to carrying out trades during this period. It is my view if indeed there were irregularities in the defendant's account, he would have promptly lodged a complaint. The fact that no complaint was lodged during the period of the trades showed that these allegations are not bona fide and amount to an afterthought. On this point, I would like to refer to the case of *One & Co Pte Ltd v Foo Sae Heng* [1990] 2 MLJ p 85 where the High Court of Singapore held at p 85 as follows:

> As regards the point that the defendant had never given instructions to purchase the shares, this point was totally devoid of merit. Debit notes were sent to the defendant. The defendant had not denied that he received the debit notes. If in fact the purchases were contrary to instructions, one would expect an immediate protest by him. By not objecting to the documents sent to him, he had effectively affirmed that the transactions were properly carried out. He was estopped from denying the same.

**[11]** The defendant had contended that part of the losses arose as a result of the transactions done in two accounts. However, the plaintiffs remisier (PW3) had

testified that the use of the account was at the behest of the defendant and his mother. This evidence was further corroborated by the evidence of PW4 who confirmed this during her evidence. PW3 the remisier had at length in the trial referred to exh P18 and exh P11, explaining how the transactions were carried out at the request of the defendant and his mother. The defendant further admitted making payment by his own cheque of RM16,680 for losses incurred in the account of Yock Hing (PW4). This evidence contradicts his own evidence that he was unaware of the use of this account. It is also noted that the defendant's counsel had failed to put the defendant's case across when the witnesses for the plaintiff gave evidence. No attempt was made by learned counsel for the defendant to challenge this aspect of the evidence. The fact that the defendant did not know the owners of the account for which some transactions were married is irrelevant if it is shown on the evidence that the defendant did request for these married transactions. The contention of the defendant that the losses in the third party account were dumped into the defendant's account is unfounded and lack *bona fides*.

**[12]** With regard to the trading limit, the defendant had contended that the trading limit of RM150,000 had been breached. However, it is noted there was no evidence adduced by the defence to prove that the defendant had objected to the increased trading limit. For the plaintiff, there is evidence of PW1 who testified that the trading limit is a guide for a remisier to determine the amount of transactions that the remisier would allow the client to trade.

**[13]** The trading limit can be breached and it depends on the remisier's assessment of the credit worthiness of the clients, the collateral and the remisier's deposit. This part of the evidence was not challenged by learned counsel for the defendant. There is also the evidence of PW3 (remisier) who testified that at the material time his security deposit was RM746,970.43 and that the plaintiff's company had given him 10 times that of his security deposit as a trading limit which means roughly about RM7.4m.

**[14]** It is my view even if the transaction exceeded the trading limit this alone does not invalidate the transaction. The breach of the trading limit is only for internal use and it is up to the plaintiff in its discretion to permit such trading. On this point I would like to refer to the case of *Arab Malaysian Securities Sdn Bhd v Chan Mon Hoi @ Yeo Mon Hoi* [2000] MLJU 774 wherein the high court inter alia held as follows:

> The trading limit imposed by the plaintiff on the defendant was for the plaintiff's own protection. If the defendant intended to transact beyond the trading limit prescribed by the plaintiff, it was up to the plaintiff, in its discretion to permit such trading. In the absence of fraud or cheating, the transactions carried out by the plaintiff based on the defendant's transactions were valid.

**[15]** On the issue of the losses being set-off from the remisier's deposit pursuant to the remisier's agreement and whether the zero balance in the monthly account

constitute a discharge of the amount owing to the plaintiff, I find the plaintiffs witnesses PW1 and PW3 in their evidence had explained to the court how the zero balance came about in the monthly statements. They had testified that they arose as a result of the set-off from the remisier's deposit due to the defendant's failure in settling the debt after a certain period. This set-off according to PW1 and PW3 applied to all remisiers in the plaintiff's company in accordance with cl C.1(ii) and C.2 (I) under the remisier's agreement (see exh P5).

**[16]** PW1 further testified that if there was any payment received from the client after the set-off from the remisier's deposit, the said sum would be debited back to the remisier. The zero balance appearing in the defendant's monthly statements arose after the plaintiff deducted the defendant's remisier's deposit. The defendant's liability to pay the plaintiff arises out of the undertakings and indemnities given in his Account Application Form and the zero balance did not come about due to the defendant's settlement of the outstanding losses. I find this part of the plaintiffs evidence was unchallenged and not disputed by the defendant.

**[17]** On the issue of subrogation the plaintiff contends that it has the right to pursue the claim against the defendant, notwithstanding that the debt was deducted from the remisier's deposit. The plaintiffs claim against defendant is founded on the doctrine of subrogation. I find there is merit in the plaintiffs contention. This is clearly borne out by the evidence of the remisier (PW3) where he confirmed that he instructed the plaintiff to commence this action against the defendant for the recovery of the sum due and owing as contained in the amended statement of claim.

**[18]** It is noted that PW1 for the plaintiff had testified that the outstanding losses from the defendant were set-off against the remisier's deposit. Hence the amount owing from the defendant would be credited back to the remisier's deposit upon settlement received from the defendant. In the circumstances, it is my view that the correct party to commence this action is the plaintiff's company since the privity of contract only exists between the plaintiff and the defendant as the contracting parties for the said transactions.

**[19]** Finally, on whether the defendant's remisier had committed fraud against the defendant as contended by the defendant, it is my finding that there is no evidence led by the defendant to prove this. The only evidence raised by the defendant was his allegation about the use of third party accounts for the transaction. This aspect of the issue had been satisfactorily explained by PW3 and PW4. There is the further evidence of the defendant having settled some of these losses involving the third party accounts by the various receipts which were produced during the trial. In the light of the foregoing, the allegation remains unproven and ought to be viewed as an afterthought.

## CONCLUSION

**[20]** It is my finding that the plaintiff has succeeded on the balance of probabilities in proving its case against the defendant. For the above stated reasons, the plaintiffs

claim against the defendant is allowed with costs and I hereby make the orders as prayed for in the statement of claim.

*Application allowed with costs.*

Reported by Sally Kee